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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 661.

FRED A. CARLSON, E. D. DITTO, SMILEY F. GRIFFEY, JOHN THOMAS HOLT, EARL MURRAY, JR., ARTHUR OWENS, JOHN L. OWENS, FLOYD C. PETTY, PAUL PRATT, MAX REIMER, WAYNE SISCO AND WILLIAM L. WATTS, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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(1) The ruling of the Court of Appeals herein, if permitted to stand, will extend federal jurisdiction under the National Stolen Property Act (18 U. S. C. A. 415, 1948 Ed., Sec. 2314, and Title 18, U. S. C. A. 418a, 1948 Ed., Sec. 371) to all conspiracies where the sum of $5,000.00 or more may be obtained by combining the value of goods stolen or obtained by fraud before interstate transportation with the value of goods or money so obtained as a part of the conspiracy after the interstate transportation has ended. Such holding changes the statutory language "therefore stolen, etc.," to mean theretofore or thereafter stolen, etc., in violation of the rules of statutory construction 11

(2) There is neither direct nor substantial circumstantial evidence of an agreement among the defendants to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud in Oklahoma. The Court of Appeals unanimously held there was no substantial evidence of the actual transportation of wheat of such value as obtained and reversed the conviction on the substantive count of the indictment. Proof of such an agreement involving property of a value of $5,000.00 or more theretofore stolen or obtained by fraud

was a necessary element of the crime and without such evidence there was a failure of proof of the corpus delicti 16

(3) The desired inference that defendants could have manipulated the scales in Oklahoma so as to there obtain by fraud wheat of a value of $5,000.00 or more is precluded by the positive and uncontradicted testimony of plaintiff's witnesses describing the actual occurrences in Oklahoma which are inconsistent with, and destroy such inference 18

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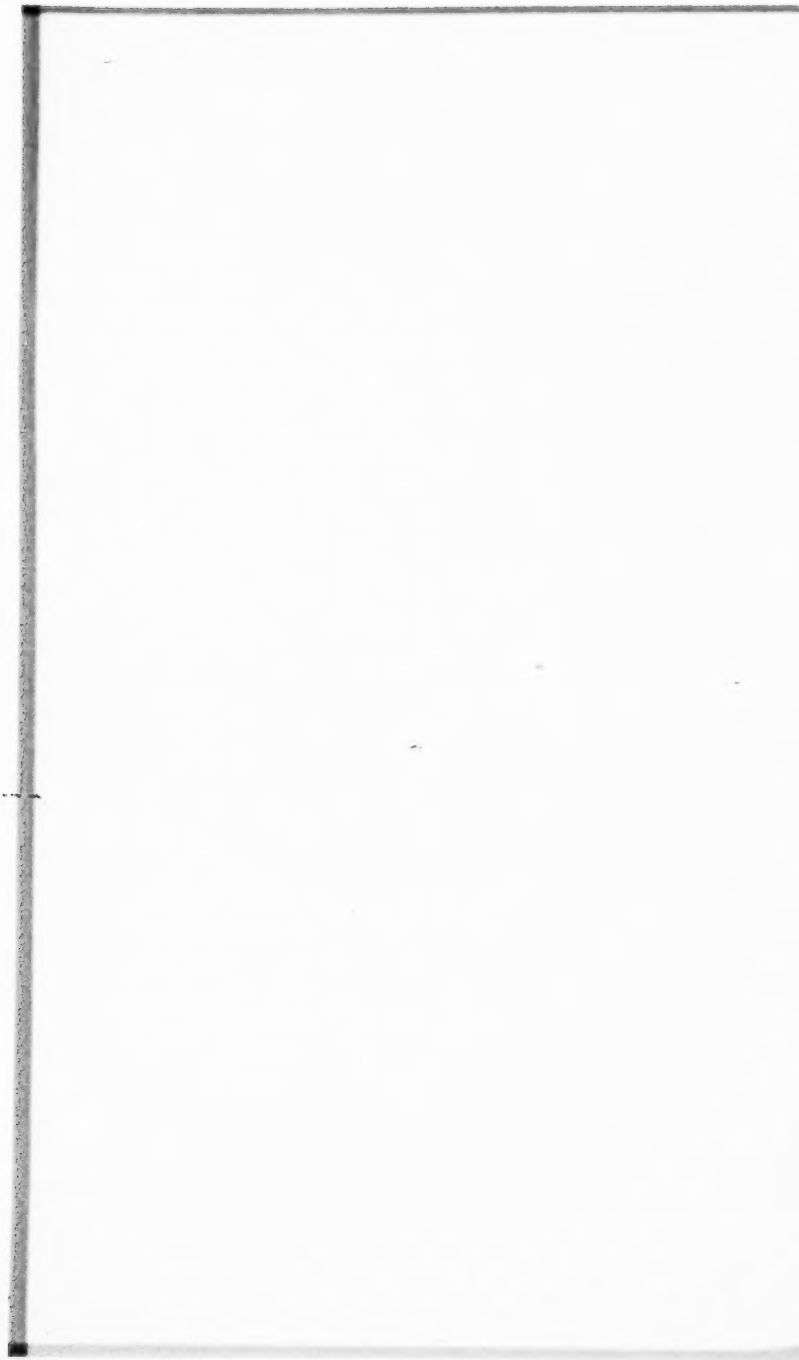

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vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Fred A. Carlson, E. D. Ditto, Smiley F. Griffey, John Thomas Holt, Earl Murray, Jr., Arthur Owens, John L. Owens, Floyd C. Petty, Paul Pratt, Max Reimer, Wayne Sisco and William L. Watts, Petitioners, pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, in the cases of Fred A. Carlson et al., Appellants, vs. United States of America, Appellee, numbers 4154 to 4165, in-

clusive (which cases were tried below as one case and were consolidated and heard as one appeal in the United States Court of Appeals for the Tenth Circuit), entered on February 19, 1951, affirming the judgments of the United States District Court for the District of Kansas, on Count One of the Indictment and reversing the judgments on Count Two of the Indictment.

OPINION BELOW.

No opinion was filed by the trial court. The opinions of the Court of Appeals are not yet reported. The majority opinion of the Court of Appeals (reversing as to Count Two and affirming as to Count One) appears at pages 519 to 530 of this Record. The minority opinion, concurring in the reversals on Count Two and dissenting as to the affirmances on Count One appears on pages 530 to 533 of this Record.

JURISDICTION.

The judgments of the Court of Appeals sought to be reviewed were entered on February 19, 1951 (R. 533-541). All petitioners on March 6, 1951, timely filed their Joint and Separate Petition for Rehearing (R. 543, 554). Said Petition for Rehearing was denied March 9, 1951 (R. 555).

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 2101 (d), and Rule 37 (b) of the Federal Rules of Criminal Procedure, promulgated by this Court February 8, 1946.

QUESTIONS PRESENTED.

1. Whether the language of the criminal statute (Title 18, U. S. C. A., 415, 1948 Ed., Sec. 2314) "theretofore stolen, etc.," may be construed to mean theretofore or thereafter stolen, etc.?

2. Whether federal jurisdiction may be extended by combining the value of goods allegedly obtained by fraud after the interstate transportation has ended with the value of goods allegedly so obtained prior to such transportation to attain the necessary value of $5,000.00 or more?

3. Whether in a case where there has been no actual transportation in interstate commerce and no proof of an agreement to transport in such commerce, goods of a value of $5,000.00 or more theretofore stolen, etc., an agreement to engage in transportation of such an amount may be inferred in the absence of proof the agreement, if any, was specifically limited to a lesser amount?

4. Whether the inference may be drawn that defendants could have obtained by manipulating the scales in Oklahoma $5,000.00 or more of wheat they did not pay for when the uncontradicted evidence of plaintiff's witnesses prove no such amount was there obtained and directly contradict the conclusion they could have so obtained such an amount in Oklahoma?

5. Whether decisions of the Fourth, Fifth and Eighth Circuits holding that to justify conviction under such a conspiracy count the conspiracy must relate to goods of a value of $5,000.00 or more stolen or obtained by fraud prior to the interstate transportation are to be overruled?

STATUTES INVOLVED.

Title 18, U. S. C. A. 415 (1948 Ed., Sec. 2314).
Title 18, U. S. C. A. 418a (1948 Ed., Sec. 371).

STATEMENT.

On March 22, 1950, a joint indictment in two counts was filed against the petitioners, and Charles E. Dixon, Allen B. Greep, Charles C. Griffey, Melvin L. McNutt and Jerry Spargur (the latter were acquitted by the jury) in the United States District Court for the District of Kansas, charging them with violations of the National Stolen Property Act.

Count One of the Indictment charged the defendants with conspiracy to violate the provisions of Section 415, Title 18, United States Code, in that they conspired, confederated and agreed to transport and cause to be transported in interstate commerce wheat of a value exceeding $5,000.00 theretofore stolen, etc. The indictment set forth eight overt acts alleged to have been committed in furtherance of the conspiracy (R. 5-9, Opinion, R. 519).

Count Two charged the defendants with the substantive offense of transporting in interstate commerce 3,480 bushels of stolen wheat of the value of more than $5,000.00 (R. 9, Opinion, R. 519).

At the close of all the evidence the defendants filed a joint and several motion for judgments of acquittal, which the court overruled as to both counts of the indictment and as to all defendants (R. 11-12, 422).

The case was then submitted to the jury on both counts and as to all defendants, resulting in verdicts of

guilty against all the petitioners as to both counts and in verdicts of not guilty as to both counts as to defendants Charles E. Dixon, Allen B. Greep, Charles C. Griffey, Melvin L. McNutt and Jerry Spargur (R. 12, 13, 14).

Petitioners filed their joint and several motion for a new trial on June 8, 1950 (R. 15-17). Petitioners filed their amended motion for new trial on June 14, 1950 (R. 17-21). On June 26, 1950, Petitioners' amended motion for a new trial was denied by the Court (R. 21).

Each of the Petitioners was, on the aforesaid date, given a sentence of 3 years on the first count, and 3 years on the second count, to run concurrently (R. 22-35, Opinion, R. 519-520).

Petitioners then appealed to the United States Court of Appeals for the Tenth Circuit (R. 36, 37). The cases were there consolidated and heard as one appeal (R. 519).

Petitioners' appeals were principally on the grounds there was no federal jurisdiction and no proof of the *corpus delicti* in that there was no substantial evidence of any actual transportation in interstate commerce of wheat of a value of $5,000.00 or more theretofore stolen, feloniously converted or taken feloniously by fraud, and no substantial evidence of any agreement to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud (Opinion, R. 520). Petitioners presented and kept alive these grounds in their motions for directed verdicts of acquittal (R. 10-12); motion for new trial and amended motion for new trial (R. 15-21) and motion for rehearing in the Court of Appeals (R. 543-554).

The division of three judges of the Court of Appeals hearing said appeals unanimously held there was no substantial evidence of any actual transportation in inter-

state commerce of wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud; that such finding by the jury was based on speculation, and reversed the convictions of all the petitioners as to the second, or substantive, count of the indictment (Opinion, R. 524, 530, Minority Opinion, R. 530, 533).

The Government's case was directed to proof of the fraudulent manipulation of trucks on the scales while being weighed, resulting in false weights, both when they were being weighed empty and when they were being weighed loaded, and that in each instance they were allegedly manipulated in defendant's favor so that they got more wheat than they paid for in Oklahoma and got paid for more wheat than they had at Wichita (R. 528, 529).

The opinions of the Circuit Judges (majority and minority) fail adequately to state the facts bearing on the issues presented. Detailed references are therefore made to the record throughout as well as to the opinions. The majority opinion of the two judges will be referred to herein as "opinion."

The evidence tended to show the following:

> "To prove both counts, the prosecution relied solely upon the activity of the defendants in connection with the purchase of nine truck and trailer loads of wheat in Oklahoma on June 20 and June 22, 1948, and the transportation of the same to Wichita, Kansas, on the 22nd of June. The evidence established that on June 20th some of the defendants purchased three loads of wheat from an elevator at Ponca City, Oklahoma; four loads at Braman, Oklahoma, on June 20, 1948; and two loads at Jet, Oklahoma, on June 22nd. The felonious fraud relied upon is the claim of unlawful manipulation of the scales in favor of the defendants when the wheat was weighed" (Minority Opinion, R. 531, Opinion R. 520-524, also R. 6, 7).

The scales at Braman were large enough to weigh a truck and trailer combination at the same time and were not capable of the type of manipulation described as occuring at Wichita (Minority Opinion, R. 531, also R. 56, 60).

The Seller of the wheat at Braman testified that so far as he knew all the wheat obtained there had been paid for (Minority Opinion, R. 531, also R. 59, 60).

> "At Jet the seller said that so far as he knew all the wheat obtained there had been paid for. The only complaint made in connection with the purchases in Oklahoma was at Ponca City. There the seller described the manner of handling the trucks on the scales but his testimony created no more than a suspicion. He estimated his loss at 200 bushels" (Minority Opinion, R. 531, Opinion, R. 524, 526, also R. 89, 91, 92, 100, 101, 112, 113, 121, 123).

The Kansas Milling Company at Wichita made no claim they paid for any wheat they did not get (R. 242).

The three trucks which loaded at Ponca City were not traced or accounted for from about 7 a. m., June 20, until about 6:20 p. m., June 22 (R. 112, Opinion, R. 522).

There was evidence that in South Wichita, Kansas, after the interstate transportation ended, six or seven hundred bushels of wheat was transferred to one of the trucks involved the afternoon before the sale of the nine loads of wheat at Wichita later that night (R. 396, 397, 400, 401, 404, 405, 406). The majority opinion denies the existence of such testimony (R. 524).

On the afternoon of June 22, 1948, petitioner John L. Owens contacted the Kansas Milling Company at Wichita and arranged for the sale of nine loads of wheat to be de-

livered later that day or night (Opinion R. 523, R. 175, 177).

During the afternoon of June 22, 1948, these nine trucks cleared the Caldwell and New Haven ports of entry and proceeded to Wichita where they lined up consecutively to be weighed at the Kansas Milling Company (Opinion R. 521, 523, R. 189, 195, 199, 212, 213, 214, 220).

Petitioner Murray there drove all the trucks on the scales (Opinion, R. 523. Also R. 206, 222). There was a lot of evidence indicating possible manipulation of the loads on the scales at Wichita so as to make them weigh heavy when loaded and weigh light when empty (Opinion, R. 523, 527, 528, also R. 187, 188, 226, 196, 198, 207, 224, 228). The alleged methods of manipulation are detailed by the court in the footnote on page 526 of the Record.

Defendants sold 3,480 more bushels of wheat at Wichita than the evidence shows they bought in the three places in Oklahoma for which they received $7,483.79 more money than they paid for the wheat purchased at the three places in Oklahoma (Opinion, R. 528, 529, also R. 320, 321).

The jury returned verdicts of guilty on both counts against the petitioners (R. 12-15). The sentences (R. 22-35) were affirmed by the United States Court of Appeals which filed a majority opinion (R. 519, 530) and a minority opinion (R. 530-533) and entered judgments in accordance with the majority opinion February 19, 1951 (R. 533-541).

SPECIFICATION OF ERRORS TO BE URGED.

THE COURT OF APPEALS ERRED:

1. In holding the terms of the criminal statute (Title 18, U. S. C. A. 415) "theretofore stolen, etc." should be construed to mean theretofore or thereafter stolen, etc.

2. In holding that the value of any goods allegedly obtained by fraud after the interstate transportation was over should be added to the value of goods allegedly so obtained before such transportation to make up the requisite value of $5,000.00 or more.

3. In holding evidence tending to show mere ability to manipulate the scales both in Oklahoma and at Wichita, Kansas, so as to fraudulently obtain $7,500.00 justified the inference defendants could have so manipulated the scales in Oklahoma alone as to accomplish the same result.

4. In holding that an inference that the defendants purposed to defraud in Oklahoma to the full extent of their ability supported the further inference that the defendants conspired to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud.

5. In holding it was immaterial whether defendants obtained $7,500.00 by fraudulent manipulation of scales in Oklahoma before the interstate transportation or in Wichita, Kansas, after such transportation.

6. In holding there was substantial evidence justifying the inference of an agreement among defendants to transport from Oklahoma in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud.

7. In affirming the District Court as to the convictions of all the petitioners on Count One of the indictment.

REASONS FOR GRANTING THE WRIT.

The majority decision of the Court of Appeals extends federal jurisdiction under the National Stolen Property Act (Title 18, U. S. C. A. 415 and 418a) far beyond any previous decision. The act was designed to prevent the pollution of the streams of interstate commerce with goods which were stolen or obtained by fraud. It was not concerned with what transpired after the interstate transportation had ended. So that the federal courts would not be burdened with the trial of lesser crimes Congress specifically limited federal jurisdiction to cases involving interstate transportation of goods "of a value of $5,000.00 or more theretofore stolen, etc." The majority decision here has the effect of striking out of the statute the word "theretofore" and substituting for it the words theretofore or thereafter which constitutes a complete reversal of its clearly expressed meaning. This is a criminal statute and the liberties of these petitioners are at stake. Such construction violates the rules of statutory construction of criminal statutes and brings this opinion into conflict with the decisions of this Court hereinafter cited.

The majority decision of the Court of Appeals that the $5,000.00 valuation of the property agreed to be transported in interstate commerce is not an essential element of the crime charged and the failure to prove such value is not fatal to conviction is in direct conflict with decisions of the Fourth, Fifth and Eighth Circuits as pointed out in the minority opinion dissenting as to the affirmance of the convictions on Count One (Minority Opinion, R. 532).

The issues here are of great public interest and importance and have never been directly passed on by this Court in the particular form here presented. They directly

involve a question of federal jurisdiction and of an extension of the law of conspiracy far beyond any previous decision involving the National Stolen Property Act. The confusion and unsettled condition which this decision must create can be ended finally and conclusively only by this Court taking jurisdiction and determining the matter. The majority opinion has relaxed the time-honored requirements of proof in criminal cases (as pointed out in the minority opinion, R. 533) to the great prejudice of petitioners.

(1) The ruling of the Court of Appeals herein, if permitted to stand, will extend federal jurisdiction under the National Stolen Property Act (18 U. S. C. A. 415, 1948 Ed., Sec. 2314, and Title 18, U. S. C. A. 418a, 1948 Ed., Sec. 371) to all conspiracies where the sum of $5,000.00 or more may be obtained by combining the value of goods stolen or obtained by fraud before interstate transportation with the value of goods or money so obtained as a part of the conspiracy after the interstate transportation has ended. Such holding changes the statutory language "theretofore stolen, etc.," to mean theretofore or thereafter stolen, etc., in violation of the rules of statutory construction.

The statute invoked by the plaintiff (Title 18, U. S. C. A. 415, 1948 Ed., Sec. 2314) specifically limits prosecutions thereunder to:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities or money, of the value of $5,000.00 or more theretofore stolen, feloniously converted, or taken feloniously by fraud, etc."

The Act was directed against the pollution of the streams of interstate transportation with stolen goods or goods which were obtained fraudulently. It was not con-

cerned with what happened afterwards. Furthermore Congress saw fit to limit criminal responsibility to cases where the stolen property transported in interstate commerce was of a value of $5,000.00 or more, leaving prosecutions where the values involved were less to the state courts. *Backun* v. *United States,* (4 Cir.) 112 F. 2d 635, 639; *Russell* v. *United States,* (8 Cir.) 119 F. 2d 686, 688.

The substance of the holding of the majority in the Court of Appeals, is:

> "There being one conspiracy, it must be viewed in its entirety" (Opinion, R. 528).
>
> "The gist of the offense was to defraud by the manipulation of the scale weights to the end that appellants got more wheat than they paid for. The evidence supports the conclusion that they did manipulate the scales in their favor both when they purchased wheat in Oklahoma and when they sold it in Wichita. They did manipulate the scale weights so that they sold approximately $7,500.00 worth of wheat more than they paid for in Oklahoma. Whether this resulted from a manipulation of the scales in Oklahoma so that they failed to pay for $7,500.00 worth of wheat which they actually purchased or from a manipulation of the scale weights in Wichita, so that they were paid for $7,500.00 worth of wheat which they did not have, is beside the point. The important point is that it established their ability to manipulate the scale weights to the extent of $7,500.00 worth of wheat. If they could manipulate the scale weights so that they were paid for $7,500.00 worth of wheat that they did not have, it is a reasonable deduction to assume that they could have likewise manipulated the scales in Oklahoma, so that they received that much more wheat there than they paid for. The fact that by manipulating the trucks on the scales at both points of purchase and sale, appellants were enabled to sell 3,480 bushels more wheat of a value of $7,483.79 than

> they paid for, warranted the jury in concluding that their purpose in going to Oklahoma was to defraud the vendor there to the full extent of their ability" (Opinion, R. 528, 529).

We submit it is clear that the majority opinion holding that the statutory amount was involved was based on the fruits of the alleged combined frauds in Oklahoma and at Wichita, Kansas, and not on any finding that wheat of a value of $5,000.00 or more was transported from Oklahoma which had been theretofore stolen or obtained by fraud. There is only one statement in the opinion which casts any doubt on that being the basis of the ruling. That statement is (Opinion, R. 529):

> "If they could manipulate the scale weights so that they were paid for $7,500.00 worth of wheat that they did not have, it is a reasonable deduction to assume that they could have likewise manipulated the scales in Oklahoma, so that they received that much more wheat than they paid for."

We have pointed out under point 3 of these Reasons for Granting the Writ that such conclusion is prevented by the plaintiff's uncontradicted evidence which destroys such conclusion. Furthermore the finding of the majority that they went to Oklahoma to defraud to the extent of their ability (Opinion, R. 529) and yet that they did not in Oklahoma obtain by fraud $5,000.00 or more of wheat whereby the second or substantive count of the indictment had to be reversed, is contradictory of and tends to destroy any such conclusion. The minority opinion points this out (Minority Opinion, R. 532).

The Court of Appeals majority opinion has the effect, we submit, of adding to the statute the word "thereafter" so that instead of meaning, as it specifically states, "there-

tofore" it is construed to mean "theretofore or thereafter" which is a complete perversion of its language.

This violates the rule of statutory construction stated by this Court in the case of *Kordel* v. *United States,* 335 U. S. 345, 348-349, 69 S. Ct. 106, 109, as follows:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States* v. *Resnick,* 299 U. S. 207, 57 S. Ct. 126, 81 L. Ed. 127; *Kraus & Bros.* v. *United States,* 327 U. S. 614, 621, 622, 66 S. Ct. 705, 707, 708, 90 L. Ed. 894), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated."

It also, we believe, violates the rule stated by this Court in the case of *Viereck* v. *United States,* 318 U. S. 236, 243, 63 S. Ct. 561, 564:

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

The reasoning of the majority opinion of the Court of Appeals, as we understand it, is that by manipulations in Oklahoma and at Wichita, Kansas, the defendants obtained over $7,500.00 by fraud; that that established their ability to manipulate the scale weights to the extent of $7,500.00 worth; that the jury could infer from defendants' conduct "that their purpose in going to Oklahoma was to defraud the vendor there to the full extent of their ability" (Opinion, R. 529). By such illogical reasoning the majority relieves plaintiff of the necessity of proving an agreement to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud which is necessary to establish federal

jurisdiction and shifts to the defendants the burden of defeating federal jurisdiction by proving an agreement to limit their operations to wheat of a value of less than $5,000.00.

That ruling is in direct conflict with the decision of the Fourth Circuit in the case of *Andrews* v. *United States,* 108 F. 2d 511, in a prosecution under Title 18, U. S. C. A., Sections 415 and 416, where the Court said (l. c. 515):

> "It is said that his dealings with Sencindiver showed a conspiracy which was not limited as to the amount of the stolen goods to be transported. This is true; but, as there is no evidence of agreement to transport goods of the value of $5,000.00 or more, and as goods of that amount were not transported, there is nothing upon which to base a finding that the conspiracy contemplated a transportation of such magnitude as to constitute a violation of such statute. The evidence is sufficient to show that he received stolen goods knowing them to have been stolen and that he conspired with Sencindiver to handle them in interstate commerce; but before he can be convicted of conspiracy to violate the statute here involved it must appear that the goods to which the conspiracy related were of a value of $5,000.00 or more."

It is also in conflict with the decision of the Eighth Circuit in the case of *Buchanan* v. *United States,* 164 F. 2d 15, 16, 17, in a conspiracy action brought under the statutes here involved holding there must be proof of an agreement to transport in interstate commerce goods of the value of $5,000.00 or more theretofore stolen or obtained by fraud to confer federal jurisdiction.

The minority opinion in the Court of Appeals pointed out this conflict (R. 532) between the majority opinion and the Andrews and Buchanan cases cited above and also with *Backun* v. *United States,* (4 Cir.) 112 F. 2d 635, 638, and *Crain* v. *United States,* (5 Cir.) 148 F. 2d 615, 617.

We submit this extension of federal jurisdiction beyond the language of the statute and the relaxation of time-honored requirements of proof in criminal cases evidenced by the majority opinion herein (and pointed out in minority opinion, R. 533) is a matter of great public interest and importance and calls for review and correction by this Court.

(2) There is neither direct nor substantial circumstantial evidence of an agreement among the defendants to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud in Oklahoma. The Court of Appeals unanimously held there was no substantial evidence of the actual transportation of wheat of such value so obtained and reversed the conviction on the substantive count of the indictment. Proof of such an agreement involving property of a value of $5,000.00 or more theretofore stolen or obtained by fraud was a necessary element of the crime and without such evidence there was a failure of proof of the corpus delicti.

The Court of Appeals unanimously held there was no substantial proof of an actual transportation from Oklahoma to Kansas of wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud and reversed the convictions on Count Two (the substantive count) of the indictment (Opinion, R. 524, 530, Minority Opinion, R. 530, 532, 533).

The Minority Opinion states: "The United States does not contend that there is direct evidence of the unlawful agreement. It relies upon circumstances" (Minority Opinion, R. 532).

As the statutes under which this prosecution proceeded (Title 18, U. S. C. A. 415, 1948 Ed., Sec. 2314, and

Title 18, U. S. C. A. 418a, 1948 Ed., Sec. 371) apply only where there are involved goods of a value of $5,000.00 or more theretofore stolen or obtained by fraud, it follows that there must be proved an agreement to transport goods so obtained of the requisite value to sustain the charge of conspiracy to violate such Act (Minority opinion, R. 532, 533 and cases of the Fourth, Fifth and Eighth Circuits there cited).

In the case of *United States* v. *Falcone*, 311 U. S. 205, 210, 61 S. Ct. 204, 207, it is stated:

> "The gist of the offense of conspiracy as defined by Section 37 of the Criminal Code, 18 U. S. C., Sec. 88, 18 U. S. C. A., Sec. 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone* v. *United States*, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419; *Marino* v. *United States, supra; Troutman* v. *United States*, (10 Cir.), 100 F. 2d 628; *Beland* v. *United States*, (5 Cir.), 100 F. 2d 289; cf. *Gebardi* v. *United States, supra.*"

The gist of the offense charged under the conspiracy count is an agreement among the conspirators to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by fraud. As stated in the minority opinion "the proof of an agreement to fraudulently obtain wheat in Oklahoma of the value of $5,000.00 or more and then transport it to Wichita is wholly lacking" (Minority opinion, R. 532). The minority opinion further stated "so in this case where there is no evidence of the conspiracy except the transportation of the property the evidence must show that the property transported was of the statutory value. Under the proof here, when the substantive violation goes out the conspiracy count goes with it" (Minority opinion, R. 532).

Such proof is a necessary element of the *corpus delicti.* The want of such evidence leaves a vital part of the *corpus delicti* unproved and the trial Court erred in refusing to direct verdicts of acquittal as to all defendants on Count One of the indictment.

There was no evidence of any agreement to transport wheat of the requisite value theretofore stolen or obtained by fraud. To sustain the convictions it is necessary to infer such an agreement. The only possible basis for such an inference is what was actually done. There was little evidence of manipulation in Oklahoma and at only one of the three places where wheat was obtained in Oklahoma, allegedly involving approximately 200 bushels of wheat of approximately $400.00 in value, allegedly obtained fraudulently, while there was a mass of testimony indicating possible manipulation of weights of all nine trucks at Wichita (Minority opinion, R. 531, Opinion, R. 526).

We submit such testimony contradicts and destroys the inference desired by the prosecution and wholly fails to sustain any such inference.

(3) The desired inference that defendants could have manipulated the scales in Oklahoma so as to there obtain by fraud wheat of a value of $5,000.00 or more is precluded by the positive and uncontradicted testimony of plaintiff's witnesses describing the actual occurrences in Oklahoma which are inconsistent with, and destroy such inference.

Four of the nine loads of wheat involved were obtained in Braman, Oklahoma (R. 55, 58, 63, 73). The scales at Braman were large enough to weigh a truck and trailer combination at the same time and in one operation and were not capable of the manipulation described as occurring at Wichita (R. 56, 60, Minority Opinion, R. 531).

This vendor saw nothing wrong with the weighing and had no reason to believe the weights were not right (R. 57, 60).

Two of the loads of wheat were obtained at Jet, Oklahoma (R. 88, 89). The scales there were too short to permit of weighing the tractors and semi-trailer outfits in one operation (R. 91) but there was no evidence of any fraudulent manipulation of the scales and the vendor testified that so far as he knew they did not take anything they did not pay for (R. 92, Minority Opinion, R. 531).

The other three loads were obtained at Ponca City, Oklahoma (R. 97, 99). These outfits were trucks with beds on them and each had two-wheeled pup trailers hooked on behind (R. 97, 98, 124). These were smaller outfits than the large semi-trailers used at Braman and Jet (R. 55, 58, 63, 73).

There was a mass of evidence of alleged manipulation of the scales at Wichita in the weighing of all nine trucks (Minority Opinion, R. 531, R. 206, 222, 187, 188, 226, 207, 196, 198, 224, 228, 208, Opinion, R. 524, 526, 527, 528, 529).

The computations of plaintiff's FBI witness Robert V. Harman, computed 3,480 more bushels of wheat were sold in Wichita than defendants paid for in the three places in Oklahoma and that they received $7,483.79 more for this wheat at Wichita than they paid the three venders in Oklahoma (R. 320, 321, Opinion, R. 529). This ignores the evidence, which we consider to be uncontradicted, that six or seven hundred bushels of wheat were transferred to one of the loads in South Wichita, Kansas, before the delivery to the Kansas Milling Company (R. 396, 397, 400, 401, 404, 405, 406). It also ignores the fact the three trucks loaded at Ponca City were not traced or accounted for over a period of 2½ days (R. 112, Opinion, R. 522).

The majority opinion in the Court of Appeals holds that proof that by manipulation of the scales both in Oklahoma and at Wichita they sold $7,500.00 worth more wheat in Wichita than they bought in Oklahoma justified the jury in inferring "they could have likewise manipulated the scales in Oklahoma, so they received that much more wheat than they paid for" (Opinion, R. 529). That inference is contradicted by plaintiff's testimony that most of the alleged manipulation occurred at Wichita; by plaintiff's testimony that at Braman the scales were large enough to weigh tractor and trailer all in one operation and were not capable of the manipulation described at Wichita; by plaintiff's testimony that at Braman and at Jet the vendors saw nothing wrong and had no reason to believe they were defrauded.

We believe the ruling of the majority in the Court of Appeals is contrary to and violates the ruling of this Court in the case of *Pennsylvania R. Co.* v. *Chamberlin*, 288 U. S. 333, 340, 341, 53 S. Ct. 391, where this court said (l. c. 394):

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."
>
> "A rebuttable inference of fact, as said by the Court in the Wabash Railroad Case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the Court in *George* v. *Mo. Pac. R. R. Co., supra*, 'It is well settled that, where plaintiff's case is based upon an inference or inferences, the case must fail upon proof of undisputed facts inconsistent

with such inferences.' Compare *Fresh* v. *Gilson et al.*, 16 Pet. 327, 330, 331, 10 L. Ed. 982."

Here the plaintiff offered proof of undisputed facts inconsistent with the inference that by manipulation of the scales in Oklahoma alone defendants could have fraudulently have there obtained over $5,000.00 worth of wheat. From the plaintiff's uncontradicted testimony it affirmatively appears that the inference sought to be drawn is without substantial support and is not warranted under the rule in the *Chamberlin case, supra.*

The majority opinion is in conflict with the decision of this Court in the case of *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711, 63 S. Ct. 1265, 1269, where this Court said:

> "* * * charges of conspiracy are not to be made out by piling inference upon inference * * *."

It must be remembered that the burden of proof was on the plaintiff on this issue. The evidence here is more consistent with the hypothesis that the defendants did not have the ability to manipulate the scales in Oklahoma so as to there obtain by fraud wheat of a value of $5,000.00 or more than with the hypothesis that they did have such ability. The evidence of such ability was therefore not substantial and the Trial Court should have directed verdicts of acquittal. *Gunning* v. *Cooley,* 281 U. S. 90, 94, 95, 50 S. Ct. 231, 233; *Stevens* v. *The White City,* 285 U. S. 195, 204, 52 S. Ct. 347, 350.

In the case of *Kassin* v. *United States,* (5 Cir.) 87 F. 2d 183, it is stated (l. c. 184):

> "Conspiracy charges do not present opportunities for departure from, they present merely specific instances for the application of, the rules governing the

problem of judicial proof. *McLaughlin* v. *United States*, (C. C. A.) 26 F. 2d 1; *Dahly* v. *United States*, (C. C. A.) 50 F. 2d 37; Underhill on Evidence, Sec. 775."

The minority opinion of the Court of Appeals sums up the situation thus (R. 633):

> "The burden, however, was upon the United States to prove beyond a reasonable doubt that the defendants conspired to transport interstate property of the value of $5,000.00 or more which had theretofore been stolen or feloniously obtained by fraud. We should not permit a relaxation of time honored requirements of proof in criminal cases or extend federal jurisdiction because it appears that the defendants may have been swindlers.
>
> "I think the court should have directed a verdict as to both counts."

We submit the record sustains the conclusion of the learned circuit judge who dissented as to the affirmance of the convictions under Count One and for such reason a writ of certiorari should issue herein.

CONCLUSION.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Title 18 United States Code.

Sec. 413. National Stolen Property Act; citation.

Sections 413-419 of this title may be cited as the "National Stolen Property Act" (May 22, 1934, Ch. 333, Sec. 1, 48 Stat. 794).

Sec. 414. Same; definitions.

When used in Sections 413-419 of this title—

(a) The term "interstate or foreign commerce" shall mean transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia. * * * (May 22, 1934, Ch. 333, Sec. 2, 48 Stat. 794.)

Sec. 415. Same; transportation of stolen or feloniously taken goods, securities, or monies; transportation of articles used in counterfeiting.

Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000.00 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * * (May 22, 1934, Ch. 333, Sec. 3, 48 Stat. 794; Aug. 3, 1939, Ch. 413, Sec. 1, 53 Stat. 1178).

* * * * * * * *

Sec. 418a. Same; conspiracy.

If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of sections 413-419 of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by sections 413-419 of this title (May 22, 1934, Ch. 333, Sec. 7, as added Aug. 3, 1939, Ch. 413, Sec. 5, 53 Stat. 1179).

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MAY 17 1951

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 661

FRED A. CARLSON, E. D. DITTO, SMILEY F. GRIFFEY, JOHN THOMAS HOLT, EARL MURRAY, JR., ARTHUR OWENS, JOHN L. OWENS, FLOYD C. PETTY, PAUL PRATT, MAX REIMER, WAYNE SISCO AND WILLIAM L. WATTS, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF OF PETITIONERS.

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Wichita, Kansas,
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vs.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF OF PETITIONERS.

Because of pending prosecutions under similar indictments and the great public importance of the issues involved in this Petition for a Writ of Certiorari, we feel it our duty to call to the attention of the Court the following facts which will be shown by the records of the respective Courts and of which we believe this Court should be informed before passing on this Petition.

There is now pending in the United States Court of Appeals for the Tenth Circuit an Appeal, taken since the preparation of the petition herein, entitled *United States of America* v. *Paul Blackford, William W. Blackford, Carroll D. Hager, Robert Hager, Ronald L. Hawk, George Nielsen, Hans Nielsen, and Marshall Weddle*, wherein convictions on the conspiracy count of a similar indictment (there being no convictions on the substantive count) are up for review by that Court involving similar facts and the same issues presented in this petition for a Writ of Certiorari.

There are also pending in the United States District Court for the District of Kansas two cases involving similar indictments in two counts, said cases being: *United States of America* v. *William W. Blackford, Robert Hager, James Lee McVey, Hans Nielsen, George Nielsen, Arthur Owens, Wayne Sisco, and Gerald Vanover*, No. 8273; and *United States of America* v. *John L. Owens, Fred A. Carlson, R. C. Clifton, Charles H. From, B. L. Gardner, Jr., Burton H. Herpel, E. L. Howard, Willis A. Peve, Orville E. Rapue, Henry Swaney and Frank A. Wilmes*, No. 8280. The issues presented in the cases pending on appeal before the United States Court of Appeals for the Tenth Circuit and the two cases pending in the United States District Court for the District of Kansas are all based on indictments similar to the one involved in the present case and involving similar facts and issues.

Because of the great public importance of the issues involved and the effect of the determination of such issues on pending litigation we respectfully urge the Court to issue its Writ of Certiorari to review and finally determine the issues presented for the protection of the rights of these petitioners and the defendants in the several other pending cases, for the guidance of the Courts in passing upon and determining such pending and future litigation, and to save

a great amount of time and great expense to the government and said defendants.

Respectfully submitted,

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